



FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Special Administrative Law Judge Shufelt was asked to address issues dealing with claimant's average weekly wage, unpaid medical mileage, future medical and vocational rehabilitation. These issues were not appealed to the Appeals Board and, as such, the findings of the Special Administrative Law Judge with regard to these issues are adopted in toto by the Appeals Board as though fully set forth herein.

On February 2, 1993, claimant was employed as a lab technician for respondent. The duties of claimant included opening jars, removing samples from jars, using pipettes, washing and cleaning laboratory apparatus all requiring regular repetitive use of her hands and upper extremities. Approximately two to three months after starting work for respondent, claimant began developing problems with her right hand (dominant hand) followed shortly by symptomatology to her left hand, although to a lesser degree.

Claimant initially sought treatment from her family physician who diagnosed tendinitis and prescribed splints. Claimant was eventually referred to Dr. Abbas, a neurologist, and diagnosed with bilateral carpal tunnel syndrome. She was treated with non-steroidal drugs and wrist splints and later referred to Dr. Lygrisse and Dr. Mark Melhorn. Dr. Melhorn ultimately performed a right carpal tunnel release on June 20, 1994 and a left carpal tunnel release on July 6, 1994.

Following surgery respondent accommodated claimant with light-duty work, including copying, filing and answering the telephone. Claimant's husband had been laid off from his job and, after finding employment in Oklahoma, relocated. Claimant, shortly after the surgery, terminated her employment with the respondent on August 4, 1994, and moved to Oklahoma to be with her husband.

At the time of the regular hearing claimant was employed in Oklahoma working 40 hours per week at \$5.00 per hour.

Respondent argues claimant should be denied compensation under K.S.A. 44-501(c) and under the language of Boucher v. Peerless Products, Inc., Kansas Court of Appeals #74,158. As Boucher is currently before the Court of Appeals upon a motion for reconsideration and is not fully litigated, it cannot be cited as precedent in this case. It should also be noted that the Appeals Board is limited by K.S.A. 1995 Supp. 44-555c to review:

“... questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.”

The issue of claimant's disablement for a period of at least one week from earning full wages was not raised before the Administrative Law Judge and not decided by Special Administrative Law Judge Shufelt in his Award. As such, the Appeals Board cannot consider this issue upon appeal as said issue was not first presented to the Administrative Law Judge for decision. See Scammahorn v. Gibraltar Savings & Loan Assn., 197 Kan. 410, 416 P. 2d 771 (1966). The Appeals Board finds respondent's request that claimant be denied compensation, with the exception of medical expenses, due to claimant having not been disabled for a period of at least one week from earning full wages under K.S.A. 44-501(c) should be denied.

Respondent further raises the issue regarding the date of accident suffered by claimant. The Special Administrative Law Judge, in citing Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), found claimant to have suffered a date of accident of August 4, 1994.

Special Administrative Law Judge Shufelt, in citing Berry as controlling, felt claimant's last day worked would be the appropriate date of accident to be used in this matter. The Appeals Board disagrees. Claimant worked at her regular job tasks to June 20, 1994, at which time she was taken off work briefly for right wrist carpal tunnel surgery and placed in rehabilitation. While claimant did return to work, pending surgery on her left wrist on July 6, she did not return to her regular job duties. The Appeals Board finds, following the rationale of Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995), a more appropriate date of accident would be the date claimant left her regular employment and was referred for surgical treatment for her carpal tunnel condition. It is noted by the Appeals Board that as both accident dates occur after July 1, 1993, and as there is no Workers Compensation Fund liability at issue in this matter, the modification in date of accident, other than changing the starting time of claimant's benefits, has little or no effect upon claimant's award. Nevertheless, in adopting the rationale of the Court of Appeals in Condon, *supra*, the Appeals Board finds the modification of date of accident to be appropriate in this matter.

Respondent also raises the issue as to whether claimant suffered accidental injury arising out of and in the course of her employment. While there is some evidence in the record regarding claimant's non-work activities, in particular her part-time job as a housekeeper/companion for Archie Adams, the evidence is not persuasive that a part-time housekeeping job would cause claimant significantly more difficulty than her full-time work with respondent. As such, the Appeals Board finds the evidence regarding claimant's job duties with respondent prove by a preponderance of the credible evidence that claimant did suffer accidental injury arising out of and in the course of her employment with respondent.

The Board must next decide the nature and extent of claimant's accidental injury.

In reviewing the Award, the Appeals Board finds the opinion of the Special Administrative Law Judge accurately sets out the findings of fact and conclusions of law dealing with claimant's nature and extent of injury and disability in some detail and it is not necessary to repeat same herein. The findings and conclusions enumerated in the Award of the Special Administrative Law Judge are accurate and appropriate and the Appeals Board adopts same as its own findings and conclusions as if specifically set forth herein regarding the nature and extent of claimant's accidental injury. The Appeals Board finds this evidence overcomes the presumption of no work disability contained in K.S.A. 44-510e. The claimant's economic circumstance which precipitated the voluntary termination and relocation, convinces the Appeals Board that a work disability should not be precluded herein.

In applying equally the opinions of Dr. Melhorn and Dr. Schlachter, both of whom adopt the analysis of Mr. Hardin regarding claimant's reduction in task loss, the Appeals Board finds a 25 percent reduction in claimant's ability to perform work tasks to be appropriate. In further comparing claimant's average weekly wage on the date of injury to her current employment at \$200.00 per week, claimant has suffered a 41 percent wage loss. Under K.S.A. 44-510e, in averaging the reduction of claimant's ability to perform tasks with the difference between the average weekly wage claimant was earning at the time of the injury and the average weekly wage claimant is currently earning, the Appeals Board finds claimant has suffered a 33 percent work disability stemming from her injuries suffered with respondent as above described.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge David A. Shufelt dated December 1, 1995, shall be affirmed in part, and modified in part in that claimant shall be granted an award against the respondent, USPCI, Inc., and its insurance carrier, National Union Fire Insurance Company of New York, for an injury occurring on June 20, 1994, and based upon an average weekly wage of \$340.93, for a 33% permanent partial general body work disability as a result of the injuries suffered therein.

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Katherine S. Chaplin, and against the respondent, USPCI, Inc., and its insurance carrier, National Union Fire Insurance Company of New York, for an accidental injury occurring on June 20, 1994, and based upon an average weekly wage of \$340.93, for 136.95 weeks of permanent partial general body work disability compensation at the rate of \$227.30 per week or \$31,128.74, for a 33% permanent partial general body work disability.

As of March 11, 1996, there is due and owing claimant 90 weeks permanent partial general body work disability compensation at the rate of \$227.30 per week or \$20,457.00, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance is to be paid for 46.95 weeks permanent partial general body disability at the rate of \$227.30 per week, until fully paid or further order of the Director.

Reimbursement to claimant for mileage requested is granted upon presentation of an itemized schedule of the aforementioned trips as awarded by Special Administrative Law Judge Schufelt.

Future medical is awarded upon proper application to and approval by the Division of Workers Compensation. Vocation rehabilitation was neither offered nor ordered.

Claimant's contract of employment with his attorney is approved insofar as it in agreement with K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

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| Barber & Associates<br>Transcript of Regular Hearing                     | \$177.30 |
| Barbara J. Terrell & Associates<br>Deposition of Ernest Schlachter, M.D. | \$ 71.50 |
| Kelley, York & Associates, Ltd.<br>Deposition of J. Mark Melhorn, M.D.   | \$174.20 |

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1996.

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BOARD MEMBER

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**DISSENT**

I respectfully dissent from the opinion from the majority of the Appeals Board with regard to claimant's entitlement to work disability under K.S.A. 44-510e(a). In this case claimant was not only offered employment with respondent subsequent to her surgeries at a comparable wage, but actually returned to work and worked with respondent for a period of time. Claimant's husband was laid off from his job and sought employment in Oklahoma. Subsequent to claimant's surgery, she voluntarily terminated her employment and moved to Oklahoma to be with her husband.

Claimant should be denied work disability as claimant had been accommodated by respondent at a comparable wage. This Board Member would apply the logic of Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), and also the logic of the Appeals Board in Wollenberg v. Marley Cooling Tower Company, Docket No. 184,428 (Sept. 1995), in denying claimant entitlement to a wage loss as a component of claimant's work disability. This Board Member would apply Foult in this circumstance, where claimant has both been offered and actually worked employment with respondent at a comparable and where both doctors felt claimant was able to perform the offered employment. Claimant's voluntary self-removal from the labor market should not penalize a respondent, ready, willing and able to accommodate claimant at a comparable wage.

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BOARD MEMBER

c: Timothy J. King, Wichita, KS  
Orvel Mason, Arkansas City, KS  
David A. Shufelt, Special Administrative Law Judge  
Philip S. Harness, Director